APPENDIX

(Opinion by Weinfeld, D.J.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 34

#32881

UNITED STATES OF AMERICA,

—against—

THOMAS KAPATOS,

Defendant.

APPEARANCES:

HON. ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York
Attorney for United States of America

JAY GOLD, ESQ.
Assistant United States Attorney
Of Counsel

FRANK A. LOUIS, ESQ.
THEODORE [illegible], ESQ.
[illegible]
Brooklyn, New York
Attorneys for Defendant

EDWARD WEINFELD, D. J.

The defendant, following his conviction of a hijacking at gunpoint of an interstate shipment of jewelry, moves for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, and for arrest of judgment under Rule 34.

The motion, in one aspect, charges the government with "suppression of evidence." It was brought about by a somewhat extravagant statement made by the Assistant United States Attorney in the heat of post-trial atmosphere when he moved to remand the defendant pending sentence. The assistant then stated:

> " . . . this case could have been a lot stronger if we had one more witness, and that witness was murdered one year ago, and I have every reason to believe that he (the defendant) murdered him."

Prior to trial the United States Attorney furnished defense counsel the names of witnesses the government did not intend to call "who may have information which you may determine to be pertinent to your client's defense." Obviously, the name of the murdered man was not listed. All other witnesses were accounted for upon the trial.

Defense counsel, based upon the Assistant United States Attorney's reference to the murdered man, now seeks "any statement, admissions, confessions, electronic or tape recordings" of the deceased, and "that a fact hearing be held to determine whether there has been suppression of evidence favorable to the defendant which could have changed the verdict."

The motion is predicated upon defense counsel's conclusion that the murdered man "must either be one of the perpetrators or an informant close to the scene," and upon an assumption that (1) he made a statement to govern-

mental authorities, and (2) it contains exculpatory matter or other information which, had it been available to the defense, would have contradicted the theory of the prosecution and bolstered that of the defense.

The government, in resisting this motion, relied upon the insufficiency of the moving papers. However, in addition, the Assistant United States Attorney represented that the government had no statements from the murdered man bearing upon the instant case; that such statements by the deceased as there were referred not to the crime of which this defendant was found guilty, which occurred in November 1963 in New York City, known as the Triple A jewelry holdup, but to an entirely unrelated crime, a hijacking of a bank truck which was committed a year thereafter, in December 1964, in Paterson, New Jersey, and that the government had information upon which it was suspected this defendant, the murdered man, together with others, one of whom was also murdered, were involved. The assistant's explanation for his original reference on the remand motion to the murdered man was that at one time the authorities had hoped to gain his confidence and cooperation relative to the Triple A holdup, but before this could materialize he was murdered.

Notwithstanding the insufficiency of the moving papers, which alone requires denial of the motions, this court required the government to turn over all statements and all interview reports containing statements of the murdered man referred to on the motion to remand, as well as those of the second murdered man to whom reference was first made upon the argument of the current motion. The court has examined these; they contain not a single word or reference either to this defendant in connection with the interstate theft in November 1963 or to any other aspect of this theft. The present motion may properly be catergorized as utterly

unfounded and without the slightest evidential foundation.[1] The statements of the two deceased will be returned to the authorities to be retained by them in the event any appellate or other court hereafter desires to examine them.

Equally without substance is the further contention that the admission in evidence of identification of the defendant two years after the crime and some six or seven weeks before his indictment and arrest in January 1966 abridged his privilege against self-incrimination[2] and his right to counsel.[3] The identifications were the result of observations of the defendant by several of the holdup victims while he was on a public thoroughfare at his place of employment, and on another occasion at a public restaurant. The defendant was not then in custody; the crime was unsolved; no arrests had been made; the matter was still under investigation. The observations were in pursuance of the continued inquiry to identify or perhaps to exonerate alleged par-

---

[1] The defendant's reliance on Campbell v. United States, 365 U.S. 85 (1961) is misplaced. *Campbell* concerns itself with the statements of a government witness who had already testified. At issue was whether documents in the possession of the government were statements within the purview of section 3500 of Title 18 to be turned over to the defense. Here obviously there can be no such issue; we are not concerned with a witness who testified, moreover, the government has delivered to the court for its inspection all documents or reports containing statements of the deceased.

The defendant's reliance on Mitchell v. United States, 368 U.S. 439 (1962, is equally misplaced. *Mitchell* decided that a motion alleging that materially false testimony was used against a defendant upon his trial and supported by a hitherto unoffered affidavit corroborating the defense should have been treated as a motion for a new trial on the ground of newly discovered evidence. The defendant here has so moved under Rule 33, as well as under Rule 34.

[2] See Schmerber v. California, 384 U.S. 757, 761 (1966) (". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . ."); United States ex rel. Stovall v. Denno, 355 F.2d 731, 737-38 (2d Cir.), cert. granted, 16 L.ed.2d 1014 (1966).

[3] United States ex rel. Stovall v. Denno, *supra* n.2, 738-40.

ticipants in the then still unsolved crime—which still remains unsolved as to four other alleged participants. The claim that any constitutional rights of the defendant were violated is without merit.[4]

The motion, insofar as it seeks to set aside the verdict as being against the weight of evidence, is denied. Finally, insofar as the motion rests upon refusal to charge supplemental requests Nos. 1 and 3, it is likewise denied. Apart from the lack of substance to the claim that it was error to decline the requests,[5] no exception was taken to the court's instructions or to its failure to grant specific requests.[6]

The foregoing shall be deemed the entry of an order denying the motion in all respects.

Dated: New York, N. Y.
October 28, 1966

EDWARD WEINFELD
United States District Judge

---

[4] See nn. 2 and 3 *supra*.

[5] As to request number one, see United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964); Escalante v. United States, 228 F.2d 61, 62-3 (5th Cir. 1955); Davis v. United States, 78 F.2d 501 (10th Cir. 1935); Hendrix v. United States, 327 F.2d 971, 974 (5th Cir. 1964); People v. Spinello, 303 N.Y. 193, 203 (1951); People v. Yates, 165 C.A.2d 489, 332 P.2d 314, cert. denied, 360 U.S. 920 (1959); People v. Daly, 168 C.A.2d 169, 335 P.2d 503 (1959).

[6] See Rule 30, Fed. R. Crim. P.